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12 UNITED STATES DISTRICT COURT

13 DISTRICT OF NEVADA

14 ZANE M. FLOYD,

15 Plaintiff,

16 v.

17 CHARLES DANIELS, Director, Nevada
Department of Corrections; HAROLD
18 WICKHAM, NDOC Deputy Director of
Operations; WILLIAM GITTERE,
19 Warden, Ely State Prison; WILLIAM
REUBART, Associate Warden at Ely State
20 Prison; DAVID DRUMMOND, Associate
Warden at Ely State Prison; IHSAN
21 AZZAM, Chief Medical Officer of the State
of Nevada; DR. MICHAEL MINEV, NDOC
22 Director of Medical Care, DR. DAVID
GREEN, NDOC Director of Mental Health

Case No. _____
(To be supplied by the Clerk)

**PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER
WITH NOTICE AND PRELIMINARY
INJUNCTION**

(DEATH PENALTY CASE)

**EXECUTION WARRANT SOUGHT
BY THE STATE FOR THE WEEK OF
JUNE 7, 2021**

ORAL ARGUMENT REQUESTED

Care, LINDA FOX, NDOC Director of
Pharmacy; JOHN DOES I-XV, NDOC
execution team members,

Defendants.

DATED this 16h day of April, 2021.

RENE L. VALLADARES
Federal Public Defender
District of Nevada

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

/s/ Timothy R. Payne
TIMOTHY R. PAYNE
Assistant Federal Public Defender

**MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE
AND PRELIMINARY INJUNCTION WITH BRIEF IN SUPPORT**

Plaintiff Zane Floyd, by and through his counsel, moves this Court for a temporary restraining order, with notice and preliminary injunction against the Defendants preventing them from executing Plaintiff by lethal injection until further order of the Court. This request for injunctive relief is submitted pursuant to Rule 65 (a) and (b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Plaintiff is a prisoner confined under the supervision of the Nevada Department of Corrections (NDOC). Plaintiff's NDOC Prisoner No. is 66514. Plaintiff has been sentenced to death by lethal injection. The State, through an April 14, 2021 state court application filed by the Office of the Clark County District Attorney for an Order of Execution, seeks to execute Plaintiff during the week commencing on the 7th day of June, 2021.

The Defendants are employees of the State of Nevada. Currently, Defendant Charles Daniels is the Director of NDOC, in Las Vegas, Nevada. William Gittere is the Warden of the Ely State Prison in Ely, Nevada. The Defendants are charged with carrying out the execution of Plaintiff.

Plaintiff has initiated this action by filing, contemporaneous to the instant motion, a Complaint pursuant to 42 U.S.C. section 1983. The Complaint asserts that the State of Nevada intends to carry out Plaintiff's execution utilizing an experimental lethal injection protocol, never previously used by Nevada or any other state.

1 Counsel for Plaintiff presumes that the State of Nevada intends to carry out
2 Plaintiff's execution in accordance with its Execution Protocol dated June 11, 2018.
3 That protocol calls for utilization of three drugs – midazolam, fentanyl and
4 cisatracurium - to be administered sequentially. The protocol is experimental and
5 presents the first instance of a state proposing to use a paralytic agent as the final,
6 killing drug.

7 Plaintiff asserts the Defendants are acting under color of Nevada law in
8 designing the NDOC protocol for execution by lethal injection. Plaintiff asserts that
9 the current Execution Protocol as well as the selection and administration of the
10 chemicals, in amounts and combinations determined by the Defendants, either will
11 unnecessarily risk conscious suffering and pain in the execution of the sentence of
12 death, or the Defendants are deliberately indifferent to Plaintiff's health, welfare,
13 and safety, or both.

14 Plaintiff asserts that the risk of substantial harm and suffering presented by
15 Nevada's execution protocol violates Plaintiff's constitutional guarantees to be free
16 from cruel and unusual punishment under the Eighth Amendment and to have his
17 sentence carried out in accordance with due process of law under the Fourteenth
18 Amendment.

19 Plaintiff is aware of his duty to exhaust administrative remedies, and
20 is currently proceeding to fulfill that duty.

21 Plaintiff further asserts that Defendants are unable to safely implement the
22 proposed 3-drug lethal injection procedure, creating a substantial risk of harm to
23

1 Plaintiff. The risks associated with Defendants' failure to comply with their protocol
2 are intertwined with the risks associated with Defendants' lack of adequate training
3 and use of an untested, experimental procedure, including the untried use of a
4 paralytic agent as the third and final drug. The Defendants' proposed procedure
5 could very well result in a torturous execution for Plaintiff.

6 **ARGUMENT AND AUTHORITY**
7 **SUPPORTING REQUEST FOR INJUNCTIVE RELIEF**

8 **I. LEGAL STANDARDS APPLICABLE TO MOTION**

9 Consonant with Rule 65, Plaintiff is requesting an injunction to preserve the
10 status quo until a full trial on the merits of his Complaint can be conducted.

11 Irreparable injury will occur if Defendants are not restrained from proceeding with
12 Plaintiff's execution under NDOC's hastily designed and subsequently retrofitted
13 protocol, or any further redesign, using the chemicals in amounts and combinations
14 devised and administered by Defendants. A preliminary injunction precluding
15 Plaintiff's execution is the only remedy available to protect the Constitutional rights
16 secured to Plaintiff by the Eighth and Fourteenth Amendments to the United
17 States Constitution.

18 The standard a moving party must meet to obtain injunctive relief in the
19 form of a temporary restraining order or a preliminary injunction is the same: the
20 moving party must show: (1) a likelihood of success on the merits, (2) a likelihood of
21 irreparable harm, (3) the balance of hardships favors the plaintiff, and (4) an
22 injunction is in the public interest. *Johnson v. California State Bd. Of Accountancy*,
23 72 F.3d 1427, 1430 (9th Cir. 1995).

1 The Ninth Circuit case law is in accord with United States Supreme Court
2 decisions. A plaintiff seeking a preliminary injunction must establish that he is
3 likely to succeed on the merits, that he is likely to suffer irreparable harm in the
4 absence of preliminary relief, that the balance of the equities tips in his favor, and
5 that an injunction is in the public interest. *Winter v. Natural Res. Def. Council,*
6 *Inc.*, 555 U.S. 7, 20 (2008), citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008);
7 *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-*
8 *Barcelo*, 456 U.S. 305, 311-12 (1982).

9 The purpose of a preliminary injunction is to “preserve the court’s power to
10 render a meaningful decision after a trial on the merits[.]” *Alabama v. United*
11 *States Army Corps of Engineers*, 424 F.3d 1117, 1128 (11th Cir. 2005), quoting 11A
12 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice And*
13 *Procedure: Civil*, § 7 (2d ed.).

14 Although the fundamental fairness of preventing
15 irremediable harm to a party is an important factor on a
16 preliminary-injunction application, the most compelling
17 reason in favor of entering a Rule 65(a) order is the need
18 to prevent the judicial process from being rendered futile
19 by defendant’s action or refusal to act. . . . [T]he
20 preliminary injunction is appropriate whenever the policy
21 of preserving the court’s power to decide the case
22 effectively outweighs the risk of imposing an interim
23 restraint before it has done so.

19 *Id.*

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21 ///

II. APPLICATION OF LEGAL STANDARDS TO FACTS

A. Irreparable Injury

The harm the plaintiff seeks to prevent with the preliminary injunction must be both likely and irreparable. “Under *Winter*, plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction.” *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011).

“Torture and death are also clearly irreparable harms.” *Villanueva-Bustillos v. Marin*, 370 F.Supp.3d 1083, 1090 (C.D. Cal. 2018). Deprivation of constitutional rights “unquestionably constitutes irreparable injury.” *Id.* (quoting *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (citation omitted)).

There is nothing more final and irreversible than death. Plaintiff cannot be compensated adequately through money damages if or when Defendants violate his constitutional rights in executing him. The unconstitutional execution of Plaintiff before he has a chance to be heard on the merits of his claims would constitute irreparable harm for which there is no adequate remedy. A “final judgment” in the above-captioned case following a merits trial will be useless for Plaintiff if his execution is not stayed and preliminarily enjoined. This factor weighs in Plaintiff’s favor.

In Plaintiff’s Complaint, he identifies the procedures to be used by the Defendants to carry out his execution. Given that Defendants have hastily thrown together a new execution cocktail, the probability of Plaintiff sustaining an irreparable injury is substantial as he may be tortured to death through use of this

1 new combination which has yet to be tested or be examined adequately by medical
2 experts.

3 Risks associated with the Defendants' proposed use of its 3-drug procedure
4 relate to Defendants' intentions to: use midazolam as the initial, anesthetizing
5 agent, which has known shortcomings with respect to achieving sufficient
6 anesthetic depth to prevent sensation of pain, causing painful flash pulmonary
7 edema, and has been linked to a number of botched executions; use fentanyl as the
8 second agent which has rarely been used in an execution and lacks the capacity to
9 sufficiently block awareness; and use of a paralytic agent as the third and final
10 killing agent which presents a wholly unnecessary risk of causing excruciating pain
11 and suffering.

12 The Defendants' proposed use of a new, and untested 3-drug injection
13 procedure that is recognized by the medical profession to require a high degree of
14 skill and training, coupled with the documented failures and botched executions
15 involving use of midazolam, establish there is an imminent, identifiable, and
16 substantial risk that Plaintiff will experience conscious suffering and pain incident
17 to and during the execution of his sentence of death beyond what is attendant to the
18 act of dying by lethal injection.

19 Under these circumstances, irreparable harm warranting injunctive relief is
20 established.

21 ///

22 ///

B. The “Balance of Harms:” The Threatened Injury to Plaintiff Outweighs Any Arguable Injury to Defendants.

In determining the “balance of harms,” the Court must consider the nature of the irreparable injury the movant has demonstrated in light of the injury that would likely result if the actions of the defendant were restrained. Applying this factor, courts have held in favor of movants who demonstrated damage, which could not be ameliorated through conventional methods and could be avoided at less significant consequence to the defendant.

While admittedly the State of Nevada has an interest in seeing finality in its criminal prosecutions by imposing the sentence of death, substantial harm to the State will not follow from this stay of execution.

Plaintiff is seeking to prevent Defendants from violating his constitutional rights in the process of carrying out his sentence. Under these circumstances, this Court should not permit Plaintiff’s execution to proceed before the Court has the opportunity to review the full merits of his constitutional claims. The delay resulting from granting the relief sought here will have little adverse effect on the State’s interest and will ensure that it does not perform an unconstitutional execution.

Furthermore, Plaintiff “has a strong interest in being executed in a constitutional manner.” *Beatty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011). That interest outweighs the State’s interest in carrying out an unconstitutional execution.

1 Indeed, precedent dictates that where a plaintiff's safety from physical harm
2 is at risk, and entry of a preliminary injunction or temporary restraining order
3 would simply maintain the status quo while reducing that risk, the balance of
4 equities tips in the plaintiff's favor. *See Kester v. Diaz*, No. 19-cv-04205, 2019 WL
5 3997483 at *5 (N.D. Cal. August 23, 2019) ("Given that plaintiff may suffer a severe
6 assault or death if placed on [a particular prison yard] and that he is currently
7 housed in an SNY (sensitive needs yard), the balance of equities tips in his favor.
8 The temporary restraining order would simply maintain the status quo and reduce
9 the risk to plaintiff's safety."); *see also University of Texas v. Camenisch*, 451 U.S.
10 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the
11 relative positions of the parties until a trial on the merits can be held.").

12 Accordingly, the risk that Plaintiff will be subjected to an unconstitutional
13 execution outweighs the State's interest in carrying out Plaintiff's currently
14 scheduled execution.

15 C. The Injunction Is Not Adverse to the Public Interest

16 The Eighth Amendment prohibits cruel and inhumane executions. *See Baze*
17 *v. Rees*, 553 U.S. 35, 48–50 (2008); *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015).
18 The public has no interest in seeing its citizens' rights violated in the context of the
19 execution process. *See In re: Kemmler*, 136 U.S. 436 (1890).

20 "[T]here is the highest public interest in due observance of all constitutional
21 guarantees[.]" *McNearney v. Washington Dept. of Corrections*, No. C-11-5930, 2012
22 WL 3545267 at* 16 (W.D. Wash. June 15, 2012), citing *United States v. Raines*, 362
23 U.S. 17, 27 (1960); accord *Legal Aid Soc'y of Hawaii v. Legal Services Corp.*, 961

1 F.Supp. 1402, 1409 (D.Haw.1997) (“perhaps no greater public interest exists than
2 protecting a citizen's rights under the constitution.”).

3 Here, the public has an interest in seeing that Plaintiff's Eighth Amendment
4 rights are not violated. *Carmichael v. Aranas*, No. 3:17-cv-00025, 2017 WL
5 8944097 at *11 (D. Nev. April 7, 2017); *see also Melendres v. Arpaio*, 695 F.3d 990,
6 1002 (9th Cir. 2012) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“it is always in
7 the public interest to prevent the violation of a party's constitutional rights.”); *see*
8 *also Kester v. Diaz*, No. 19-cv-04205, 2019 WL 3997483 (N.D. Cal. August 23, 2019)
9 (the public has an interest in protecting inmates' Eighth Amendment right to be
10 free from deliberate indifference to their safety).

11 In this case, a preliminary injunction would not preclude the Defendants
12 from executing Plaintiff by lethal injection; it would have the immediate effect of
13 preventing the Defendants from carrying out the execution of Plaintiff based on a
14 hastily designed protocol followed by a rash decision to substitute midazolam as the
15 first drug to be administered. A preliminary injunction would preclude the
16 Defendants from proceeding with the execution of Plaintiff under a poorly
17 assembled, untested protocol. A delay for purposes of ensuring Plaintiff's Eighth
18 and Fourteenth Amendment Constitutional rights are not violated would neither
19 materially disadvantage nor injure the Defendants. Conversely, allowing the
20 execution of Plaintiff to proceed presents a grave risk to Plaintiff's Constitutional
21 rights to be free from cruel and unusual punishment as well as the arbitrary and
22 capricious actions of the Defendants in the execution of his sentence of death under
23

1 the Eighth Amendment. Allowing the execution to proceed would likewise present a
2 grave risk to Plaintiff's constitutional rights under the due process clause of the
3 Fourteenth Amendment. Plaintiff's substantial risk of irreparable injury patently
4 outweighs any arguable inconvenience, delay, or amendment of process the
5 Defendants might experience.

6 The public's interest in the timely administration of criminal justice
7 processes must be balanced against the public's interest in the Constitutional
8 administration of all criminal justice sentences, including sentences of death. Death
9 by lethal injection was proposed and adopted as a humane method of enforcing the
10 death penalty. With the Defendants' promulgation of an untested, experimental
11 lethal injection procedure, there is a great risk the outcome will not be humane. The
12 citizens of Nevada and, indeed, the Defendants as agents of the State of Nevada,
13 have an interest in ensuring the execution protocol does not result in torture or
14 conscious physical suffering. The public's interest in the outcome of this proceeding
15 weighs in favor of granting injunctive relief.

16 **D. Likelihood of Success**

17 Under this factor, plaintiff must show a "fair chance of success on the merits"
18 of his claim. *Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 754
19 (9th Cir.1982) (internal citation omitted).

20 The evaluation of this factor requires the court to examine the merits of the
21 Plaintiff's claim in light of the limited factual record and the relative positions of
22 the parties. As referenced previously, the Ninth Circuit has adopted a relaxed
23 showing on this prong when the movant has demonstrated the other requirements.

Specifically, “where the ‘balance of hardships . . . tips sharply towards the plaintiff,’ a plaintiff need only show ‘serious questions going to the merits,’ rather than likelihood of success on the merits, to warrant preliminary injunctive relief.” *Roman v. Wolf*, --- F.3d ---- (9th Cir. 2020) 2020 WL 6040125 at *4, quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *see also Villanueva-Bustillos v. Marin*, 370 F.Supp.3d 1083, 1087 (C.D. Cal. 2018).

Plaintiff has shown the other factors to be “tipped” in his favor. Through this litigation, Plaintiff is seeking enforcement of his right not to be subjected to cruel and unusual punishment in the form of torture or unnecessary conscious physical suffering, or both, during the course of his execution. This right is guaranteed by the Eighth Amendment and enforceable against the States through the Fourteenth Amendment. Plaintiff is also seeking enforcement of his right not to be deprived of life through the arbitrary and capricious actions of persons acting under color of State law. This Constitutional right is guaranteed to Plaintiff by the Fifth Amendment and is enforceable against the States through the Fourteenth Amendment. The risk that Plaintiff will be denied his Constitutional rights is imminent and substantial. The death of an inmate through lethal injection procedures that risk torture and unnecessary conscious physical suffering is the quintessence of unconstitutional action by the State resulting in irreparable injury.

III. CONCLUSION

All of the considerations applicable to this Motion militate in favor of Plaintiff’s request. No public purpose will be served by subjecting Plaintiff to the

1 clearly identified, verifiable, and substantial risk of unnecessary conscious physical
2 suffering and torture presented by NDOC's execution procedures. There is no
3 remedy at law for the consequences of such a violation of Plaintiff's Constitutional
4 rights. Equity favors preserving the status quo and allowing this litigation to
5 proceed to a full hearing on the merits.

6 For the reasons stated here and in Plaintiff's Complaint, this Court should
7 grant injunctive relief, staying Plaintiff's execution warrant and enjoining
8 Defendants or anyone from attempting to implement any aspect of Nevada's
9 execution protocol against him.

10 DATED this 16th day of April, 2021.

11 Respectfully submitted
12 RENE L. VALLADARES
13 Federal Public Defender

14 /s/ David Anthony
15 DAVID ANTHONY
16 Assistant Federal Public Defender

17 /s/ Brad Levenson
18 BRAD LEVENSON
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20 /s/ Timothy R. Payne
21 TIMOTHY R. PAYNE
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23

CERTIFICATE OF SERVICE

In accordance with LR IC 4-1(c) of the Local Rules of Practice, the undersigned hereby certifies that on the 16th day of April, 2021, a true and correct copy of the foregoing PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE AND PRELIMINARY INJUNCTION was filed electronically with the CM/ECF electronic filing system and was sent via email, addressed to counsel as follows:

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